

January 6, 2020

VIA ECF

The Honorable Lorna G. Schofield
U.S. District Court
Southern District of New York
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, New York 10007

Re: Contant, et al. v. Bank of Am. Corp., et al.,
No. 17 Civ. 3139 (LGS) (S.D.N.Y.)

Dear Judge Schofield:

Pursuant to this Court's November 16, 2018 Order (ECF No. 176), the parties write to update the Court on the status of the above-captioned action.

I. Pleadings and Pending Motions

A. Plaintiffs' Motion for Leave to File a Third Consolidated Class Action Complaint

On July 25, 2019, plaintiffs filed a pre-motion letter requesting leave to amend the operative complaint in the form of a Third Consolidated Class Action Complaint, which would include new jurisdictional allegations as to The Royal Bank of Scotland plc ("RBS"). (ECF No. 293.) On July 26, 2019, this Court ordered that by August 2, 2019, plaintiffs submit (1) an unredacted copy of the proposed amended complaint to the Chambers inbox, (2) a blackline version indicating all changes from the last complaint filed, and (3) an application to file the proposed amended complaint in redacted form. (ECF No. 295.) Plaintiffs submitted these materials on August 2, 2019.

On August 5, 2019, the Court granted plaintiffs' request to file their proposed Third Consolidated Class Action Complaint in redacted form on ECF. (ECF 303.) That same day, plaintiffs filed their redacted proposed amended complaint on ECF. (ECF No. 304.) On August 9, 2019, RBS filed a letter response in opposition to plaintiffs' pre-motion letter for leave to amend. (ECF No. 308.) On August 21, 2019, plaintiffs filed a reply letter in support of their pre-motion letter for leave to amend. (ECF No. 312.)

On December 9, 2019, the Court granted plaintiffs' motion for leave to amend and ordered plaintiffs to file the final Third Consolidated Class Action Complaint or email the complaint to the Court with any proposed redactions by December 20, 2019. (ECF No. 355.) On December 20, 2019, plaintiffs submitted a letter to Chambers with Defendants' proposed redactions to the Third Consolidated Class Action Complaint which plaintiffs did not oppose. On December 23, 2019, the Court denied the redaction request and ordered

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that by January 10, 2020, plaintiffs must renew their motion for leave to file with redactions, providing proposed redactions and an explanation from defendants as to why each requested redaction contains information that should not be publicly disclosed. (ECF No. 368.)

B. Defendants' Answers to the Second Consolidated Class Action Complaint

On January 11, 2019, Non-Foreign Defendants filed answers to plaintiffs' Second Consolidated Class Action Complaint. (*See* ECF Nos. 205-216.) Standard Chartered Bank, Barclays Bank PLC, BNP Paribas Group, HSBC Bank PLC, and UBS AG filed their answers on June 3, 2019. (*See* ECF Nos. 279-283.)

C. Plaintiffs' and Defendants' Motion to Compel Production from Non-Party FXCM

On November 12, 2019, plaintiffs filed a pre-motion letter to request that the Court compel a non-party—Forex Capital Markets, LLC (“FXCM”)—to comply with plaintiffs' subpoena for production of documents dated March 7, 2019. (ECF No. 325.) On November 13, 2019, the Court referred this motion to the Honorable Stewart D. Aaron, United States Magistrate Judge. (ECF No. 327.) On November 14, 2019, HSBC filed a letter indicating that HSBC also anticipated filing a pre-motion letter to compel production of certain documents from FXCM. (ECF No. 329.) On November 15, 2019, after being ordered to submit an agreed-upon joint briefing schedule on the motion to compel (*see* ECF No. 330), HSBC filed a proposed agreed-upon briefing schedule for the pre-motion letter seeking to compel FXCM to produce certain documents (ECF No. 331), which was then so-ordered by Judge Aaron (ECF No. 332). Pursuant to this briefing schedule, (1) HSBC filed its letter motion to compel on November 19, 2019 (ECF No. 335), (2) FXCM filed its responses to both pre-motion letters to compel filed by plaintiffs and HSBC on November 27, 2019 (ECF Nos. 342 & 343), and (3) both plaintiffs and HSBC filed their replies in support of their motions to compel on December 6, 2019 (ECF Nos. 351 & 353). On December 16, 2019, Magistrate Judge Aaron held a telephonic conference to address plaintiffs' and defendants' letter motions to compel and that same day ordered that (1) the parties and FXCM must promptly meet and confer regarding the scope of data to be produced by FXCM in response to the parties' subpoenas; and (2) no later than January 15, 2020, the parties and FXCM must file a joint letter regarding any remaining disputes as to the scope of the production by FXCM. (ECF No. 367.)

D. Plaintiffs' Motion for Preliminary Approval of Settlements with Standard Chartered Bank and Société Générale

On July 29, 2019, this Court entered an Order preliminarily approving settlements with Citigroup and MUFG Bank, Ltd., preliminarily certifying the settlement classes, and

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appointing settlement class representatives and settlement class counsel. (ECF No. 297.) On November 22, 2019, plaintiffs filed a motion for preliminary approval of settlements with two additional defendants—Standard Chartered Bank and Société Générale. (ECF Nos. 337-339.) That same day, pursuant to the Court’s November 19, 2019 Order (ECF No. 334), Plaintiffs also filed a proposed revised settlement schedule to ensure that consolidated class wide notice, claims administration, and distribution of claimant awards for the Citigroup, MUFG Bank, Ltd., Standard Chartered Bank and Société Générale settlements are carried out efficiently and in a manner that is not unduly duplicative or costly at the expense of the Settlement Class Members (ECF No. 340). The Court scheduled a preliminary approval hearing for January 9, 2020, and ordered that any opposition to plaintiffs’ preliminary approval motion be filed by December 26, 2019. (ECF No. 341.) No oppositions have been filed.

II. Discovery

A. Production of Documents

Pursuant to this Court’s November 16, 2018 Order (ECF No. 176), Non-Foreign Defendants produced to plaintiffs documents and recordings produced in discovery in *In re Foreign Exchange Benchmark Rates Antitrust Litigation* (S.D.N.Y. No. 13-cv-7789) (“FOREX”), as well as transactional data for spot FX Instrument transactions with entities identified as RFEDs by plaintiffs in November 21, 2018 and December 21, 2018 correspondence. On May 10, 2019, defendants produced *FOREX* plaintiffs’ redacted expert reports filed in connection with *FOREX* plaintiffs’ motion for class certification. Discovery was stayed as to Foreign Defendants until the Court’s ruling on their joint Rule 12(b)(2) motion to dismiss. After this Court’s ruling, on June 20, 2019, UBS AG, HSBC Bank plc, and Standard Chartered Bank similarly produced to plaintiffs documents and recordings produced in discovery in *FOREX*, as well as transactional data for spot FX Instrument transactions with entities identified as RFEDs by plaintiffs in correspondence dated November 21, 2018 and December 21, 2018.

On March 11, 2019, Non-Foreign Defendants served a first set of requests for production on plaintiffs and on May 1, 2019, plaintiffs served their responses and objections. On July 31, 2019, plaintiffs substantially completed their production of non-ESI documents in response to Non-Foreign Defendants’ first set of requests and on August 29, plaintiffs produced ESI documents in response to those requests. Plaintiffs made supplemental productions on August 30, September 6, September 12, September 13, September 20, September 27, October 1, October 3, November 8, November 18, and December 2, 2019. The parties continue to meet and confer on these requests.

On September 11, 2019, plaintiffs sent a letter to the Goldman Sachs Defendants with certain questions and requests regarding the Goldman Sachs Defendants’ productions

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of transactional data. The Goldman Sachs Defendants responded on September 30, 2019. Plaintiffs sent similar letters to Bank of America, BNP Paribas, Credit Suisse, Deutsche Bank, Morgan Stanley, and UBS on September 27, 2019 and to Barclays, JPMorgan, and RBS Securities Inc. on October 6, 2019. Responses were sent by BNP Paribas, Credit Suisse, and Deutsche Bank on October 11, 2019; JPMorgan on October 16, 2019; UBS on October 21, 2019; Bank of America on October 24, 2019; RBS Securities Inc. on October 25, 2019; and Morgan Stanley on November 6, 2019.

On October 7, 2019, plaintiffs served their first sets of requests for production on defendants Bank of America, Barclays Bank PLC, Barclays Capital Inc., BNP Paribas, Credit Suisse, Deutsche Bank, Goldman Sachs, HSBC, JPMorgan, Morgan Stanley, RBS Securities Inc., Standard Chartered, and UBS. On November 6, 2019, Bank of America, Barclays Bank PLC, Barclays Capital Inc., BNP Paribas, Credit Suisse, Deutsche Bank, Goldman Sachs, HSBC, JPMorgan, Morgan Stanley, RBS Securities Inc., and UBS served responses and objections to these requests.

B. Initial Disclosures

Plaintiffs and Non-Foreign Defendants exchanged initial disclosures on February 11, 2019. On June 17, 2019, HSBC Bank plc served initial disclosures on plaintiffs, followed by UBS AG and BNP Paribas (SA), both of whom served their initial disclosures on June 27, 2019. Initial disclosures were then served by Standard Chartered Bank on July 3, 2019 and by Barclays Bank PLC on July 16, 2019.

C. Interrogatories

On February 11, 2019, defendants BNP Paribas US Wholesale Holdings Corp. and BNP Paribas Securities Corp. served a first interrogatory on plaintiffs, to which plaintiffs served their responses and objections on March 13, 2019. On March 11, 2019, The Goldman Sachs Group, Inc. and Goldman Sachs & Co. LLC also served a first set of interrogatories on plaintiffs, as did Deutsche Bank AG and Deutsche Bank Securities Inc., to which plaintiffs served their responses and objections on May 1, 2019. On June 17, 2019, defendants JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A. served a first set of interrogatories on plaintiffs. On July 19, 2019, plaintiffs served their responses and objections to JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A.'s interrogatories and on July 25, 2019, plaintiffs served their amended responses and objections. On July 26, 2019, plaintiffs served a supplemental amended response to BNP Paribas US Wholesale Holdings Corp. and BNP Paribas Securities Corp.'s interrogatory. On September 19, 2019, defendants JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A. served a second set of interrogatories on plaintiffs. On October 21, 2019, plaintiffs served their responses and objections to JPMorgan's second set of interrogatories.

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On April 2, 2019, plaintiffs served a first interrogatory on defendants. On May 2, 2019, responses and objections to this interrogatory were served by BNP Paribas US Wholesale Holdings Corp. and BNP Paribas Securities Corp.; Bank of America Corporation, Bank of America, N.A., and Merrill Lynch, Pierce, Fenner & Smith Incorporated; Barclays Bank PLC and Barclays Capital Inc.; Credit Suisse AG and Credit Suisse Securities (USA) LLC; Deutsche Bank AG and Deutsche Bank Securities Inc.; The Goldman Sachs Group, Inc. and Goldman Sachs & Co. LLC; HSBC North America Holdings, Inc., HSBC Bank USA, N.A., and HSBC Securities (USA) Inc.; JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A.; Morgan Stanley, Morgan Stanley & Co., LLC, and Morgan Stanley & Co. International plc; RBC Capital Markets, LLC; RBS Securities Inc.; and UBS Securities LLC.

D. Depositions

Certain defendants have deposed seven of the eleven named plaintiffs: Charles Hitchcock, Paul Vermillion, Victor Hernandez, Tina Porter, Martin Han-Tran, Sandra Lavender, and James Contant.

E. Third Party Discovery

Third Party Discovery by Plaintiffs: On March 14, 2019, plaintiffs initiated service of subpoenas on sixty-one third parties that plaintiffs believe may have engaged in retail foreign exchange transactions. The parties have generally referred to entities engaged in retail foreign exchange transactions with plaintiffs and the proposed classes transacted as “RFEDs.” That designation is shorthand. Prior to amendments to the Commodity Futures Trading Commission’s regulations which became effective on October 18, 2010, entities that engaged in retail foreign exchange transactions with retail customers were not required to register as RFEDs. Following October 18, 2010, unless subject to an exemption, entities that engage in retail foreign exchange transactions are required to register as an RFED pursuant to Sections 2(c)(2)(B) or 2(c)(2)(C) of the Commodity Exchange Act. Because the class period spans from December 1, 2007 through December 31, 2013, the retail foreign exchange dealers with whom plaintiffs and members of the classes may have transacted may have never registered as RFEDs even if they engaged in retail foreign exchange transactions.

On April 11, 2019, FXDirect Dealer, LLC (“FXDD”) filed a motion to quash the subpoena served upon it by plaintiffs (ECF No. 251), which this Court denied on April 18, 2019 (ECF No. 254). On June 27, 2019, plaintiffs mailed letters to eight RFEDs that failed to respond to plaintiffs’ subpoenas by their specified production deadlines. On October 9, 2019, the trustee for Peregrine Financial Group Inc. (“PFG”) produced over 300 GB of data consisting of approximately four million documents. Plaintiffs are negotiating the scope and manner of responsive productions with counsel for FXDD and other RFEDs that

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timely served responses and objections to plaintiffs' subpoenas. Consistent with independent research, counsel for those RFEDs have represented to plaintiffs that the RFED market was highly concentrated during the class period, and therefore a substantial majority of all RFED transactions were carried out by a small number of large RFEDs. Those large RFEDs include FXCM, FXDD, GAIN Capital, and OANDA Corporation, all of which have already produced or have indicated to plaintiffs that they intend to produce documents and data responsive to plaintiffs' subpoenas. Plaintiffs primarily transacted with PFG, FXCM, FXDD, and OANDA, all of whom plaintiffs have received data from or expect to receive data from.

Third Party Discovery by Defendants: Since April 5, 2019, defendants have initiated service of subpoenas on fifty-eight third parties that plaintiffs have identified as RFEDs, including eleven entities with which named plaintiffs assert they transacted. Nine of those fifty-eight entities have made productions to defendants,¹ although only three of those nine entities have produced transaction data. Based on declarations, letters, and statements received to date, at least seventeen of these fifty-eight third parties did not engage in retail foreign exchange operations during the relevant period, December 1, 2007 through December 31, 2013.² Additional entities have similarly represented that they did not in fact operate as RFEDs, and defendants anticipate receiving declarations from those entities to that effect in the near future. Moreover, research reflects that some entities that neither plaintiffs nor defendants were able to serve or contact did not operate as RFEDs.³ Further, it appears that many of the entities identified by plaintiffs as purported RFEDs will be unable to produce responsive documents or trade data, whether due to document retention policies or because they have ceased operations and no longer possess these

¹ These nine entities include (1) Advanced Markets LLC; (2) Charles Schwab Futures, Inc.; (3) FXDirectDealer, LLC; (4) Hotspot FXR, LLC; (5) Institutional Liquidity Holdings, LLC (n/k/a/ Navitas Investments, LLC); (6) Peregrine Financial Group, Inc.; (7) Phillip Capital Inc.; (8) R.J. O'Brien & Associates, LLC; and (9) Tradestation, the succeeding entity to four other entities identified as RFEDs by plaintiffs (TradeStation FOREX, Inc., TradeStation Securities, Inc., Interbank FX, LLC, and IBFX Inc.)

² These entities include (1) ABN AMRO Clearing Chicago, LLC; (2) Advantage Futures, LLC; (3) AMP Global Clearing, LLC; (4) Dorman Trading LLC; (5) E*Trade Futures, LLC; (6) eToro USA LLC; (7) Jefferies, LLC; (8) KCG Americas LLC; (9) Knight Capital Americas LLC; (10) Knight Execution and Clearing Services LLC; (11) Newedge USA, LLC; (12) Penson Financial Services; (13) Penson Futures; (14) Phillip Capital Inc.; (15) Straits Financial LLC; (16) Wedbush Securities, Inc.; and (17) York Business Associates (d/b/a TransAct Futures).

³ For example, ACM (USA), LLC was never registered as an RFED, Forex Firm, or Forex Dealer Member with the National Futures Association.

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records.⁴ Other entities appear defunct or have otherwise ceased operations such that neither plaintiffs nor defendants have been able to successfully serve them.⁵

On March 13, 2019, the eleven named plaintiffs, in response to an interrogatory, disclosed eleven purported RFEDs with which they transacted. Based on the discovery to date, three of these entities are domiciled and operate exclusively abroad and have not been subpoenaed by either plaintiffs or defendants.⁶ Of the remaining eight, two have been dissolved,⁷ one is in bankruptcy following revelation of fraud,⁸ and two are operating outside the United States after being banned from U.S. operations by the CFTC.⁹ Although defendants continue to meet and confer with many of the remaining entities that plaintiffs identified as RFEDs, a number of these entities have informed defendants that they have had little or no contact with plaintiffs.¹⁰ At least six of these entities have represented that they had not received subpoenas from plaintiffs.¹¹

* * * * *

⁴ For example, R.J. O'Brien & Associates, LLC advised defendants that due to a five-year document retention policy, they have been unable to identify many responsive documents. TradeStation FOREX, TradeStation Securities, IBFX, and Interbank FX have similarly stated that any transaction data they could produce will likely be limited to data from 2011 onward. Advanced Markets LLC likewise stated that any production would be quite limited due to document destruction policies. Capital Market Services LLC and MB Trading Futures, Inc. have long since ceased operations and also have no transaction data in their possession.

⁵ For example, CMC Markets (US) LLC, GFS Forex & Futures, Inc., IKON Global Markets, Inc., and Solid Gold Financial Services Inc., and Wall Street Derivatives.

⁶ Dukascopy Bank, SA, HF Markets Ltd., and FOREX Capital Markets Ltd. (UK).

⁷ Alpari (US), LLC and CFS Capital Management LLC.

⁸ Plaintiffs and Defendants negotiated for the production of certain Peregrine Financial Group, Inc. ("PFG") documents by PFG's bankruptcy trustee. PFG made its first production to Plaintiffs and Defendants on Wednesday, October 9, 2019.

⁹ Forex Capital Markets LLC and FXDirectDealer, LLC. Alpari (US), LLC, Peregrine Financial Group, Inc., FOREX Capital Markets Ltd. (UK), and CFS Capital Management LLC were also penalized by the CFTC and/or NFA for misconduct including fraudulent marketing and misappropriation of customer funds.

¹⁰ These entities include Capital Market Services, FCStone LLC, and Phillip Capital Inc.

¹¹ These entities include Hotspot FXR, LLC, IG Markets, Inc., KCG Americas LLC, Knight Execution and Clearing Services LLC, Knight Capital Americas LLC, and Phillip Capital Inc.

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Pursuant to this Court's December 10, 2019 Order (ECF No. 361) and this Court's Third Amended Civil Case Management Plan and Scheduling Order (ECF No. 362), the fact discovery deadline has been extended to April 13, 2020 and the case management conference originally scheduled for January 9, 2020, has been adjourned to March 26, 2020. In light of those Orders, pre-motion letters in support of dispositive and class certification motions are due on March 12, 2020 (no later than two weeks before the March 26, 2020 case management conference, ECF No. 362).

Respectfully submitted,

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